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QUESTION PRESENTED

THE KENTUCKY SUPREME COURT CORRECTLY RULED THAT THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY IS VIOLATED WHEN DEATH SENTENCES ARE IMPOSED ON THE ACCUSED FOR THE KIDNAPPING AND MURDER OF THE SAME VICTIM.

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JURISDICTION

The cross-respondent filed a certiorari petition on October 1, 1991. The case is styled Victor Dewayne Taylor v. Commonwealth of Kentucky, No. 91-5975. Under Rule 12.3, the cross-petition for a writ of certiorari was due to be filed by October 31, 1991. However, the cross-petition was not filed in a timely manner and the cross-petitioner has sought leave to file the cross-petition out-of-time.

The cross-respondent objects to the untimely filing of the cross-petition and for the reasons stated on pp. 3-7 of this brief respectfully urges the Court to deny the motion for leave to file the cross-petition out-of-time.

STATEMENT OF THE CASE

The Jefferson County, Kentucky, Grand Jury in Louisville returned Indictment No. 84CR1549 on October 10, 1984, and charged the cross-respondent, Victor Dewayne Taylor, and George Ellis Wade with two counts of capital murder, capital kidnapping, first degree robbery and one count of first degree sodomy in connection with the deaths of Scott Nelson and Richard Stephenson. (State Transcript of Record, TR [Vol.] 1, [pp.] 13-18). The cross-respondent's motion for a change of venue was granted and venue was changed to Fayette County (Lexington) Kentucky. (TR 37, 5363-5364). Wade was tried separately in Fayette Circuit Court from January 16 through March 5, 1986. (TR 49, 7171-7264; TR 50, 7270-7273). He was found guilty of two counts of murder, robbery and

kidnapping, and was acquitted of sodomy. (TR 50, 7304-7308). The jury imposed 15 years imprisonment on the robbery convictions, 22 years on the kidnapping convictions and life imprisonment on the murder convictions. (TR 50, 7307-7308, 7328, 7330-7331, 7333). Final judgment was entered on March 17, 1986, and Wade was sentenced to life imprisonment. All sentences were run concurrently. (TR 50, 7335-7338).

The cross-respondent was tried in Fayette Circuit Court in Lexington, Kentucky, from March 17 through April 30, 1986. (TR 51, 7507-7541). The jury found him guilty of two counts of capital murder, capital kidnapping, first degree robbery, and one count of first degree sodomy. He received the maximum term of imprisonment (20 years) on the robbery and sodomy convictions. (TR 51, 7536-7537; Transcript of Evidence, TE, 4/24/86, Vol. I, 7-9). The jury imposed the death penalty for the murder and kidnapping of each of the victims. (TR 51, 7541-7544; TE 4/24/86, Vol. III, 190-194).

The Kentucky Supreme Court initially affirmed all of the cross-respondent's convictions and sentences. (See Appendix to Petition for Writ of Certiorari in No. 91-5975, hereafter Cert. App., 33-44). That court subsequently granted the cross-respondent's petition for rehearing in part. The court affirmed all convictions, the prison sentences on the robbery and sodomy convictions and the death sentences on the murder convictions. However, the death sentences for the kidnapping convictions were found to violate the constitutional prohibitions against double

jeopardy and were vacated. (Cert.App. 8-32). Taylor v. Commonwealth, Ky., 817 S.W.2d 891, 895-896 (1991).

SUMMARY OF ARGUMENT

Certiorari should be denied because of the untimeliness of the cross-petition. As shown below, the cross-petitioner has not offered a satisfactory explanation for its failure to comply with the times limits prescribed for the filing of a cross-petition under Rule 12.3 and has not set forth sufficient reasons to justify the filing of an out-of-time cross-petition.

Certiorari should also be denied because the Kentucky Supreme Court's decision that the death penalty cannot be imposed on the accused who is convicted of the murder and kidnapping of the same victim does not violate the federal constitutional precedent established in Blockburger v. United States, 284 U.S. 299 (1932) and Grady v. Corbin, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). Indeed, Kentucky, under Section 13 of the Kentucky Constitution, has adopted a broader approach to double jeopardy issues than that taken in Blockburger and Grady.

ARGUMENT

I. OBJECTION TO MOTION FOR LEAVE TO FILE AN OUT-OF-TIME CROSS-PETITION FOR A WRIT OF CERTIORARI.

The cross-petitioner seeks to file an out-of-time cross-petition for a writ of certiorari because of a purported misunderstanding for which it blames the Clerk's office.

The cross-respondent respectfully submits that the Court should deny the cross-petition because the reasons offered by the cross-petitioner in its motion are not an adequate basis upon which to grant the relief sought.

On October 1, 1991, a petition for a writ of certiorari was filed on behalf of the cross-respondent. The case is styled Victor Dewayne Taylor v. Commonwealth of Kentucky, No. 91-5975. Pursuant to Rule 12.3 of the Rules of this Court, a cross-petition for a writ of certiorari had to have been filed within 30 days of that date, i.e., on or before October 31, 1991.

The last sentence of Rule 12.3 states, "The time for filing a cross-petition may not be extended." Emphasis added. The rule is simple, direct, concise and unequivocal. It leaves no room for any misunderstanding or misinterpretation. The plain language of Rule 12.3 renders the cross-petitioner's request for relief to be non-meritorious. It is not the duty of the Clerk's office to practice the case for counsel. Presumably, members of the bar of this Court are familiar with the Court's rules and it is their responsibility to file pleadings within the time prescribed by rules. This is simply not a case in which the rule in question leaves any room for doubt.

The cross-petitioner's October 30, 1991, letter to the Clerk's office which is attached to this response (Appendix, App. p. 1) states in pertinent part:

> This is to request a 30-day extension of the October 31, 1991 deadline for filing a brief in opposition to Mr. Taylor's certiorari petition. Mr. Taylor's petition attacks the

> validity of two death sentences for capital murder. In addition to our brief in opposition, we plan to file a cross-petition attacking the reversal of two other death sentences for capital kidnapping involving the same murder victims ....

It is clear from the letter that the request for an extension of time is directed only to the brief in opposition. There is absolutely no mention of any request for an extension of time in which to file the cross-petition. Indeed, as noted above, such extensions of time are specifically prohibited by Rule 12.3.

In the motion to file the cross-petition out-of-time, the cross-petitioner states that the Clerk's response of November 4, 1991, to the request for an extension of time "was not docketed in [the office of the Kentucky Attorney General] until November 13, 1991. Undersigned counsel have never received that letter nor have they been able to locate it." The Clerk's letter, which is attached to this response (App. 2), makes it very clear that the extension of time was granted only for the purpose of allowing the Commonwealth of Kentucky to file a response to Mr. Taylor's petition for a writ of certiorari. The letter does not mention an extension of time for the purpose of filing a cross-petition. Since Rule 12.3 specifically prohibits any extension of time for the filing of a cross-petition, it is not surprising that the Clerk's letter does not make any reference to it.

Moreover, the cross-petitioner states in its motion, "But for its reliance on the Clerk's Office in this matter, Kentucky would have mailed its cross-petition on October 31, 1991, within the original filing deadline." If the cross-petition was

ready for mailing and filing on October 31, 1991, then why was an extension of time necessary? If the cross-petition was ready within the time prescribed by the rules, it should have been mailed and filed. In light of the plain language of Rule 12.3, it is neither "reasonable" nor "appropriate", as the cross-petitioner suggests, for this Court to grant an extension of time for the filing of the cross-petition.

The cross-petitioner claims that "it was reasonable for [its] counsel to rely on the advice of the Clerk's Office under these circumstances." As shown above, the record in this case does not reflect that the cross-petitioner was informed by the Clerk's office that an extension of time would be granted for the filing of the cross-petition. The cross-petitioner cannot foist blame or responsibility onto the Clerk's office for any asserted misunderstanding because Rule 12.3 is so clear and direct.

The cross-respondent respectfully submits that the authorities cited in the cross-petitioner's motion do not support its request for relief. The cross-petitioner's reliance on Rule 30 is misplaced and unreasonable because the plain language of Rule 12.3 specifically prohibits the relief being sought. The cross-petitioner's motion fails to offer any explanation as to why Rule 12.3 is inapplicable to this case.

Moreover, in Schacht v. United States, 398 U.S. 58 (1970), which is cited by the cross-petitioner, the petitioner's motion to file an out-of-time petition for certiorari was accompanied by affidavits which were "not denied or challenged" by

opposing counsel and presented "facts showing that petitioner had acted in good faith and that the delay in filing the petition for certiorari was brought about by circumstances largely beyond his control." Id. at 64. That is simply not the case here. The cross-petitioner is seeking relief only because of its unfamiliarity with Rule 12.3 and its failure to comply with the unequivocal language therein. That is not an appropriate basis upon which relief should be granted. In this case, granting the relief sought by the cross-petitioner would simply absolve counsel from his or her duty to be familiar with the Rules of this Court and practice in compliance with them. The cross-petitioner has failed to demonstrate any adequate justification for the extraordinary relief it seeks.

Accordingly, the cross-respondent respectfully urges the Court to deny the motion to direct the Clerk to file an out-of-time cross-petition for a writ of certiorari.

II. THE KENTUCKY SUPREME COURT'S DECISION DOES NOT VIOLATE THE FEDERAL CONSTITUTIONAL STANDARDS GOVERNING DOUBLE JEOPARDY ISSUES.

The cross-petitioner asserts that the Kentucky Supreme Court's decision herein conflicts with this Court's decisions interpreting the Double Jeopardy Clause of the 5th Amendment. However, as shown below, the Kentucky Supreme Court's decision herein is consistent with the precedent established by this Court.

In Kentucky, a person is guilty of murder when "With intent to cause the death of another person, he causes the death

of such person ...". Ky.Rev.Stat. [KRS] 507.020(1)(a). Murder is a capital offense [KRS 507.020(2)] which is punishable by "death, or at a term of imprisonment for life without benefit of probation or parole until [the defendant] has served a minimum of 25 years of his sentence, or to a sentence of life, or to a term of not less than 20 years." KRS 532.030(1).

Kentucky's kidnapping statute (KRS 509.040) provides in pertinent part (emphasis added):

> (1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:
> (a) To hold him for ransom or reward; or
> (b) To accomplish or to advance the commission of a felony; or
> (c) To inflict bodily injury or to terrorize the victim or another; or
> (d) To interfere with the performance of a governmental or political function; or
> (e) To use him as a shield or hostage.
> (2) Kidnapping is a Class B felony when the victim is released alive and in a safe place prior to trial, except as provided in this section. Kidnapping is a Class A felony when the victim is released alive but the victim has suffered serious physical injury during the kidnapping, or as a result of not being released in a safe place, or as a result of being released in any circumstances which are intended, known or should have been known to cause or lead to serious physical injury. <u>Kidnapping is a capital offense when the victim is not released alive</u> ...

The jury was instructed that the murder of each victim was an essential element of each kidnapping charge. (TR 52, 7617-7618).

The cross-petitioner (p. 8) asserts that "The Kentucky Supreme Court incorrectly held the punishment for these two offenses [murder and kidnapping] to violate the double jeopardy clause." This statement, however, inaccurately summarizes the

ruling of the Kentucky Supreme Court. The Kentucky Supreme Court relied on its precedent in Cosby v. Commonwealth, Ky., 776 S.W.2d 367 (1989) cert. denied Kentucky v. Cosby, ___ U.S. ___, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990) as a basis for its ruling in the case at bar. (Cert.App. 17;) Taylor, supra, 817 S.W.2d at 895.

As the Kentucky Supreme Court explained in Cosby:

> When the death is related to the kidnapping it is a crime covered by Chapter 507, Criminal Homicide, and punishable as one of the degrees of criminal homicide specified therein. There are two prongs to the double jeopardy principle. A person cannot be twice convicted or twice punished for the same murder. In a new trial the Commonwealth may try the [defendants] for both kidnapping and murder but at the sentencing phase it must elect to seek the death penalty for either kidnapping or murder. Murder and kidnapping merge at the enhancement stage. The additional element that aggravates kidnapping to a capital offense is the murder. The defendant can be convicted and punished for both offenses, but not sentenced to death for kidnapping if he is sentenced to death for murder.

Id. 776 S.W.2d at 373. Emphasis original. Thus, the cross-petitioner is simply wrong in its assertion that the Double Jeopardy Clause precludes punishment for the offenses of murder and kidnapping.

In the case at bar, the Kentucky Supreme Court reaffirmed its ruling in Cosby that

> double jeopardy principles forbid the imposition of the death penalty for murder and kidnapping, 'when the same act of murder' provides the justification. Kidnapping is only a capital offense under Kentucky law 'when the victim is not released alive' which 'refers to the victim's death being caused by some aspect of the kidnapping, not a fortuitous and unrelated circumstance.

(Cert.App. 17); Taylor, supra, 817 S.W.2d at 895 citing Cosby, supra, 776 S.W.2d at 372. Thus, the Kentucky Supreme Court concluded in the cross-respondent's case as it did in Cosby, that "'murder and kidnapping merge at the enhancement stage.'" (Cert. App. 17); Taylor, supra, 817 S.W.2d at 895 citing Cosby, supra, 776 S.W.2d at 373.

The Kentucky Supreme Court's reasoning in this case and in Cosby is consistent with the test enunciated in Blockburger v. United States, 284 U.S. 299, 304 (1932) which states that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." The same test is part of Kentucky statutory law. See KRS 505.020(2)(a) which provides that "one offense merges with another when '[i]t is established by proof of the same or less than all the facts required to establish the commission of the [other] offense.'" Cosby, supra, 776 S.W.2d at 372.

In Grady v. Corbin, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) the Court rejected the same narrow reading that the cross-petitioner would give Blockburger. In Grady, ___ U.S. at ___, 110 S.Ct. at 2090, the Court citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969) noted that the Double Jeopardy Clause "protects against multiple punishments for the same offense." The Court further noted:

> The Blockburger test was developed 'in the context of multiple punishments imposed in a single prosecution.' Garrett v. United States, 471 U.S. 773, 778 (1985). In that context, 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' Missouri v. Hunter, 459 U.S. 359, 366 (1983) ... The Blockburger test is simply 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments. Hunter, supra, at 366.

Grady v. Corbin, ___ U.S. at ___, 110 S.Ct. at 2090-2091. Other citations omitted.

In Cosby, supra, which was cited by the Kentucky Supreme Court as authority for the result it reached in the case at bar, the court applied the Blockburger rule and concluded that "where, as here, the proof relied upon to elevate the offense of kidnapping to capital kidnapping is the proof that the victim was murdered, the offenses merge." Cosby, 776 S.W.2d at 372. Thus, "[w]hile capital kidnapping required proof of facts not required for murder, murder here did not require proof of any fact not included in capital kidnapping." Cosby, 776 S.W.2d at 372 citing Blockburger, 284 U.S. at 304. Thus, the Kentucky Supreme Court's decision in the case at bar is consistent with Blockburger and KRS 505.020(2)(a) because the murder of the victims here was the essential element that elevated kidnapping to a capital offense.

The constitutional inquiry, however, does not end with application of the Blockburger rule. As the Court held in Grady v. Corbin, ___ U.S. at ___, 110 S.Ct. at 2093:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense

> charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an 'actual evidence' or 'same evidence' test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct.

The Court further held that "[I]f in the course of securing a conviction for one offense the State necessarily has proved conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." Grady, ___ U.S. at ___, 110 S.Ct. at 2093 n.11.

The Court's reasoning in Grady is applicable here. If the same conduct (murder), constitutes one crime and results in a separate punishment and, because it is an essential element of another crime (kidnapping), then multiple death sentences for the murders and kidnappings are barred under the Double Jeopardy Clause. That is especially true where, as here, the cross-petitioner has made no showing that the Kentucky Legislature specifically authorized imposition of the death penalty on the perpetrator of a murder and kidnapping where the murder is required to make the kidnapping a capital offense. See Missouri v. Hunter, supra, and Whalen v. United States, 445 U.S. 684 (1980).

The application of the Blockburger and Grady rules to the case at bar supports the result reached by the Kentucky Supreme Court because each murder of which the cross-respondent was convicted resulted in a death sentence and was then used again to enhance punishment for each kidnapping to a capital offense.

Thus, the constitutional prohibition against double jeopardy precludes imposition of the death penalty on the cross-respondent for kidnapping and murder. The authorities cited by the cross-petitioner do not dictate a different conclusion.

For example, the cross-petitioner's reliance on Williams v. Oklahoma, 358 U.S. 576 (1959) is misplaced because Oklahoma's kidnapping statute, unlike Kentucky's kidnapping statute, did not require proof that the victim was killed in order to make kidnapping a capital offense. Id. 358 U.S. at 578 n.2. The cross-petitioner's reliance on Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980) and Pryor v. State, 238 Ga. 698, 234 S.E.2d 918 (1977) is also misplaced because the defendants in those cases did not receive the death penalty for kidnapping and murder. The death penalty in each case was imposed only for the murder. Stephens, 631 F.2d at 399; Pryor, 234 S.E.2d at 921.

The cross-petition for certiorari should be denied because the Kentucky Supreme Court's reasoning is consistent with this Court's precedent interpreting the Double Jeopardy Clause.

III. SECTION 13 OF THE KENTUCKY CONSTITUTION HAS BEEN INTERPRETED BY THE KENTUCKY SUPREME COURT TO PROVIDE BROADER PROTECTIONS THAN THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

In the cross-respondent's brief (p. 40), reply brief (p. 9) and petition for rehearing (p. 17) filed in the Kentucky Supreme Court, he argued that the imposition of the death penalty for kidnapping and murder of a single victim violated the

prohibition against double jeopardy contained in Section 13 of the Kentucky Constitution as well as the 5th Amendment of the United States Constitution.

In Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990) the defendant was charged with trafficking in marijuana (selling two marijuana cigarettes) and trafficking in a controlled substance within 1000 yards of a school in violation of KRS 218A.990(5) and (16), respectively. The Kentucky Supreme Court held that multiple convictions for a single act violated the prohibition against double jeopardy contained in Section 13 of the Kentucky Constitution which provides in pertinent part, "No person shall, for the same offense, be twice put in jeopardy of his life or limb". The Kentucky Supreme Court stated that "notwithstanding the almost identical language of [the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution], our interpretation of the one has not in fact mirrored the United State Supreme Court's reading of the other." Ingram, 801 S.W.2d at 322 citing North Carolina v. Pearce, 395 U.S. 711 (1969); Ohio v. Johnson, 467 U.S. 493 (1984) and Jordan v. Commonwealth, Ky., 703 S.W.2d 870 (1986).

The Kentucky Supreme Court has clearly indicated that the double jeopardy protections offered by Section 13 of the Kentucky Constitution are more expansive than those offered by the 5th Amendment. "[W]e have at times, in a series of multiple punishment cases, inclined to the view that a single impulse or a single act constitutes but one offense. This view of [Section] 13

is obviously broader than the 'included offense' approach of Blockburger and KRS 505.020." Ingram, supra, 801 S.W.2d at 323. Thus, the Kentucky Supreme Court concluded that Section 13 of the Kentucky Constitution prohibited the defendant's convictions for trafficking in marijuana and trafficking in a controlled substance within 1000 yards of a school. Ingram, supra, 801 S.W.2d at 324-325. The reasoning in Ingram supports the result reached by the Kentucky Supreme Court in this case because the death penalty was imposed on the cross-respondent for his murder conviction and the murder was then used as the essential element necessary to elevate kidnapping to a capital offense and impose a second death sentence for that conviction. Ingram prohibits such a result as a matter of Kentucky constitutional law.

Even if the Kentucky Supreme Court incorrectly analyzed the issue here under federal constitutional standards, there are adequate and independent state grounds for the decision rendered herein because Ingram v. Commonwealth, supra, makes it clear that the Kentucky Supreme Court interprets the Double Jeopardy Clause (Section 13) of Kentucky's Constitution in a more expansive manner than this Court interprets the 5th Amendment's Double Jeopardy Clause. Granting certiorari in such a situation would therefore exceed the proper scope of this Court's power to review state court judgments. See Michigan v. Long, 463 U.S. 1032 (1983).

CONCLUSION

For the foregoing reasons, the cross-respondent, Victor Dewayne Taylor, respectfully submits that the cross-petitioner has not established any special or important reasons, pursuant to Rule 10 of the Rules of this Court, for granting the out-of-time Cross-Petition for Writ of Certiorari. Accordingly, the cross-petition should be denied.

FRANK W. HEFT, JR. *
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 625-3800
COUNSEL FOR CROSS-RESPONDENT

DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

* Counsel of Record

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

FREDERIC J COWAN
ATTORNEY GENERAL

October 30, 1991

CAPITOL BUILDING
FRANKFORT 40601

Honorable Chris Vasil
Deputy Clerk
United States Supreme Court
One First Street NE
Washington, D.C. 20543

RE: 91-5975 Victor Dewayne Taylor v. Kentucky

Dear Mr. Vasil:

This is to request a 30-day extension of the October 31, 1991 deadline for filing a brief in opposition to Mr. Taylor's certiorari petition. Mr. Taylor's petition attacks the validity of two death sentences for capital murder. In addition to our brief in opposition, we plan to file a cross-petition attacking the reversal of two other death sentences for capital kidnapping involving the same murder victims. We request this additional time because of our capital caseload elsewhere and the sheer enormity of this particular matter. The extended deadline we are requesting would be November 30, 1991.

Sincerely,

Denise Garrison McElvein

*Denise Garrison McElvein
Assistant Attorney General
Capital Litigation Branch

David A. Smith

David A. Smith
Assistant Attorney General
Capital Litigation Branch

Ernest A. Jasmin, by David A. Smith

Ernest A. Jasmin
Special Assistant Attorney General
Commonwealth Attorney
514 West Liberty Street
Louisville, Kentucky 40202

*Counsel of Record

xc: Hon. Frank W. Heft, Jr.
Hon. Daniel T. Goyette

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November 4, 1991

Denise Garrison McElvein
Assistant Attorney General]
State Capitol
Frankfort, KY 40601

RE: Victor DeWayne Taylor v. Kentucky
No. 91-5975

Dear Ms. McElvein:

Your request of October 30, 1991 for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted; the time has been extended to and including November 30, 1991.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Christopher W. Vasil
Deputy Clerk

gj
cc: Frank Heft

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